TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~490~~. 270—68

THE UNITED STATES, PLAINTIFFS,

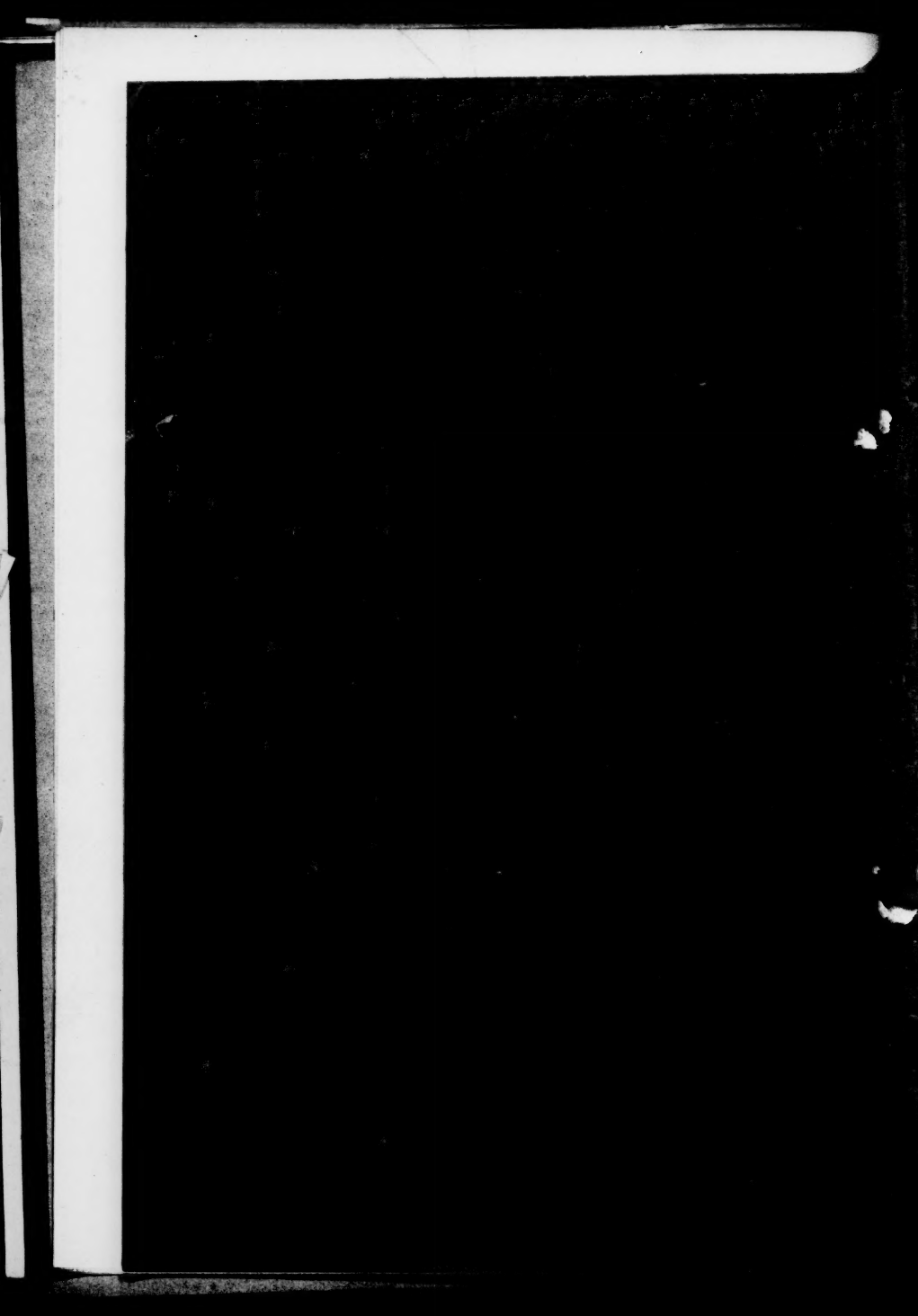
vs.

ISAAC N. COOKE.

ON A CERTIFICATE OF DIVISION IN OPINION BETWEEN THE JUDGES OF THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF OHIO.

FILED JANUARY 20, 1870.

Dec. 2, 1873



1 *Indictment for embezzlement.*

THE UNITED STATES } 191.
vs.
ISAAC N. COOKE. }

It appearing to the court that the following entry should have been made on the 25th day of June, 1870, and through inadvertance was not furnished, the same is made, nunc pro tunc. And now, at this April term of said court, A. D. 1870, this cause came on to be heard upon the demurrer to the first five counts of the indictment herein filed by the defendant, and was argued by counsel, and thereupon there occured as questions to be decided by the court: First. Whether it was and is competent for the defendant, by his said demurrer, to take exception to the sufficiency of the first five counts of the indictment for the causes assigned; and particularly whether, as it appears on the face of each of said five counts that the offences charged against the defendant are charged to have been committed severally more than two years before the indictment was returned by the grand jury and filed in court, and for that reason appearing to be barred by the provisions of section 32 of the act of Congress entitled "An act for the punishment of certain crimes against the United States," approved April 30, 1790, said five counts, or either of them, upon their face allege or charge any crime or offense against the defendant for which he is liable in law to be put upon trial, convicted and punished? Second. Whether said section 32 of the act above named, applies to the case and limits the time within which an indictment must be found after the commission of the offence charged, or is the case in regard to the period of limitation within which an indictment must be found governed by section 3 of the act of Congress, entitled "An act in addition to the act entitled an act for the punishment of certain crimes against the United States," approved March 26, A. D. 1804, or any other act limiting the period of prosecution for the offences charged in said five counts; upon which questions and each of which the opinions of the judges aforesaid were
2 opposed; and it is ordered by said judges, that the foregoing statement of the case and points of disagreement be certified by the clerk under the seal of this court to the Supreme Court of the United States at its session first to be held after this date.

Certificate of division of opinion.

THE UNITED STATES OF AMERICA,
Southern District of Ohio:

Be it remembered that, at a circuit court of the United States, within and for the district aforesaid, begun and held at the court-house in the city of Cincinnati, on the first Tuesday of April, being the 5th day of said month, A. D. 1870, and of the independence of the United States of America the ninety-fourth—present the Honorable H. H. Emmons and the Honorable H. H. Leavitt, judges of said court—came on to be heard the case of the United States of America, against Isaac N. Cooke, on an indictment returned by the grand jury and filed in said court on the 1st day of November, A. D. 1864, being a day within the October term, A. D. 1864, of said court, and upon a demurrer filed by the defendant to the first five counts of said indictment which indictment and demurrer are in the words and figures following:

Indictment.

THE UNITED STATES OF AMERICA,
Southern District of Ohio :

In the circuit court of the United States within and for the seventh circuit and southern district of Ohio, of the term of October, in the year eighteen hundred and sixty-four.

First count. The grand jurors of the United States of America within and for the seventh circuit and southern district of Ohio, upon their oaths and affirmations present, that one Isaac N. Cooke, late of said district, on the first day of May, eighteen hundred and sixty-two,
3 at Hamilton County, State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then and there being an officer of the United States, to wit, an additional paymaster in the Army of the United States, and then & there having the custody, safe-keeping, & disbursement of a large sum of money, to wit, the sum of one million dollars of the public money of the United States, which, before that time, had been, & was then & there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States by the proper authority of the United States and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters & for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States & for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the Pay Department of the Army," approved June 17, 1846; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1849, and of divers other acts and parts of acts of the said the Congress of the United States, for the payment of, and disbursement to, divers, to wit, one thousand soldiers then and there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously did then and there convert to his own use and embezzle a portion of the said public money of the United States, so to him the said Isaac N. Cooke, then & there intrusted in his official capacity as an additional paymaster in the Army of the United States, for safe keeping, transfer and disbursement, to wit, the sum of fifty thousand dollars, portion of the said public money of the United States, the same being then and there the property of the United States with intent to defraud the United States of America, contrary to the form of the act of the Congress of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

4 Second count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the sixth day of July, eighteen hundred and sixty-two, at Hamilton County, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloneously, he, the said Isaac N. Cooke, then & there being an officer of the United States, to wit, an additional paymaster in the Army of the United States, & then & there having the custody, safe keeping, & disbursement of another large sum of money, to wit, the sum of one million dollars of the public

money of the United States, which, before that time, had been, & was then & there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States, by the proper authority of the United States & by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters, and for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States, and for other purposes," approved July 5, 1838: an act entitled "An act making alterations in the Pay Department of the Army," approved June 17, 1846; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1849, and of divers other acts and parts of acts of the said the Congress of the United States, for the payment of, and disbursement to, divers, to wit, one thousand soldiers, then and there in the military service of the United States, with force & arms, unlawfully, knowingly, and feloniously, did then & there convert to his own use and embezzle a portion of the said public money of the United States, so to him the said Isaac N. Cooke, then & there intrusted in his official capacity aforesaid as an additional paymaster of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of
5 fifteen thousand dollars, portion of the said last-named public money of the United States, the same being then & there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Third count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the fifteenth day of October, eighteen hundred and sixty-two, at Hamilton County, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloneously, he, the said Isaac N. Cooke, then & there being an officer of the United States, to wit, an additional paymaster in the Army of the United States, and then & there, as such officer, having the custody, safe keeping, & disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which, before that time, had been, and was then & there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States, by the proper authority of the United States, and by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States & for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the Pay Department of the Army," approved June 17, 1846; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1849, and of divers other acts & parts of acts of the said the Congress of the United States, for the payment of, and disbursement to, divers, to wit, one thousand soldiers, then & there
in the military service of the United States, with force & arms,
6 unlawfully, knowingly, and feloniously, did then & there convert

to his own use, & embezzle a portion of the said last-named public money of the United States, so to him, the said Isaac N. Cooke, then & there intrusted to him in his official capacity aforesaid, as an additional paymaster in the Army of the United States, for safe keeping, transfer, & disbursement, to wit, the sum of forty thousand dollars, portion of said last-named public money of the United States, and which last-named sum of public money, he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then & there not authorized to retain as salary, pay, or emolument, the same being then & there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Fourth count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke, late of said district, on the twelfth day of September, eighteen hundred and sixty-two, at Hamilton County, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then & there, being an officer of the United States, to wit, an additional paymaster in the Army of the United States, and then & there as such officer, having the custody, safe-keeping, & disbursement of another large sum of money, to wit, the sum of twenty thousand dollars of the public money of the United States, which, before that time, had been, & was then & there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States, by the proper authority of the United States, & by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April 24, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4, 1836; an act entitled
7 "An act to increase the present military establishment of the United States, & for other purposes, approved July 5, 1838; an act entitled "An act making alterations in the Pay Department of the Army," approved June 17, 1864; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1849; and of divers other acts & parts of acts of the said Congress of the United States, for the payment & disbursement to divers, to wit, one thousand soldiers, then & there in the military service of the United States, with force and arms, unlawfully, knowingly, and feloniously, did then & there convert to his own use & embezzle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then & there intrusted to him in his official capacity aforesaid, as an additional paymaster in the Army of the United States, for safe-keeping, transfer, & disbursement, to wit, the sum of twenty thousand dollars, portion of said last-named public money of the United States, and which said last-named sum of public money, he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Fifth count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N. Cooke,

late of said district, on the twentieth day of September, eighteen hundred and sixty-two, at Hamilton County, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then & there, being an officer of the United States, to wit, an additional paymaster in the Army of the United States, and then and there, as such officer, having the custody, safe-keeping, & disbursement of another large sum of money, to wit, the sum of one million
dollars of the public money of the United States, which, before
8 that time had been, & was then and there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States, by the proper authority of the United States & by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April 24th, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States & for other purposes," approved July 5, 1838; an act entitled "An act making alterations in the Pay Department of the Army," approved June 17, 1846; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1859; and of divers other acts and parts of acts of the said Congress of the United States, for the payment & disbursement to divers, to wit, one thousand soldiers, then & there in the military service of the United States, with force & arms, unlawfully, knowingly, and feloniously, did then & there convert to his own use & embezzle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then & there intrusted to him in his official capacity aforesaid, as an additional paymaster in the Army of the United States, for safe-keeping, transfer, and disbursement, to wit, the sum of fifteen thousand dollars, portion of said last-named public money of the United States, and which said last-named sum of public money, he, the said Isaac N. Cooke, an additional paymaster as aforesaid, was then & there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

Sixth count. And the grand jurors aforesaid, upon their oaths and affirmations aforesaid, do further present that the said Isaac N.
9 Cooke, late of said district, on the fifteenth day of November, eighteen hundred and sixty-two, at Hamilton County, in the State of Ohio, to wit, at the district aforesaid, and within the jurisdiction of this court, with force and arms, unlawfully, knowingly, and feloniously, he, the said Isaac N. Cooke, then & there being an officer of the United States, to wit, an additional paymaster in the Army of the United States, and then and there, as such officer, having the custody, safe keeping, & disbursement of another large sum of money, to wit, the sum of one million dollars of the public money of the United States, which, before that time, had been, and was then & there, intrusted to him, the said Isaac N. Cooke, in his official capacity as an additional paymaster in the Army of the United States, by the proper authority of the United States, & by virtue of divers acts of the Congress of the United States, to wit: "An act for organizing the general staff & making further provisions for the Army of the United States," approved April

24, 1816; an act entitled "An act authorizing the appointment of additional paymasters and for other purposes," approved July 4, 1836; an act entitled "An act to increase the present military establishment of the United States & for other purposes," approved July 5th, 1838; an act entitled, "An act making alterations in the Pay Department of the Army," approved June 17, 1846; an act entitled "An act concerning the Pay Department of the Army," approved March 2, 1849, and of divers other acts, and parts of acts, of the said Congress of the United States, for the payment & disbursement to divers, to wit, one thousand soldiers then & there in the military service of the United States, with force & arms, unlawfully, knowingly, & feloniously did then and there convert to his own use, & embezzle a portion of the said last-named public money of the United States so to him, the said Isaac N. Cooke, then and there intrusted to him in his official capacity aforesaid, as an additional paymaster in the Army of the United States, for safe keeping, transfer, and disbursement, to wit, the sum of fifty thousand dollars, portion of said last-named sum of public money, he, the said Isaac N. Cooke, an additional paymaster as aforesaid was then and there not authorized to retain as salary, pay, or emolument, the same being then and there the property of the United States, with intent to defraud the United States, contrary to the form of the statute of the United States of America in such case made and provided, and against the peace and dignity of the United States of America.

FLAMEN BALL,
Att'y U. States.

Upon which said indictment is the following endorsements, to wit: A true bill. John Truman, foreman of grand jury. Filed Nov. 1, 1864. John McLean, clerk.

Demurrer.

THE UNITED STATES OF AMERICA,
Southern District of Ohio:

In the circuit court of said district.

THE UNITED STATES OF AMERICA
vs.
ISAAC N. COOKE.

Indictment for embezzling public money.

The said defendant, Isaac N. Cooke, by leave of the court, comes and demures to the first five counts of said indictment, and for cause of demurrer says it doth appear upon the face, and by the averments of the said five counts, severally, that the crime of embezzlement therein charged against him was committed more than two years before the finding and filing of said indictment, and that the prosecution therefor was, before the finding and filing of said indictment, barred by the statute in such cases made & provided; wherefore, he prays that as to said five counts he be adjudged to go hence without day.

(Signed) ISAAC N. COOKE,
By WHITMAN & HUNTER,
His Attorneys

(Endorsed:) Filed by leave, April 6, 1870. John McLean, cl'k.

11 And, thereupon, the following questions occurred before the court, upon which and each of which the opinions of the judges were opposed, namely:

First. Whether it was and is competent for the defendant, by his said demurrer, to take exception to the sufficiency of the first five counts of the indictment for the causes assigned; and particularly whether, as it appears on the face of each of said five counts that the offences charged against the defendant are charged to have been committed severally, more than two years before the indictment was returned by the grand jury and filed in court, and for that reason appearing to be barred by the provisions of section 32 of the act of Congress, entitled "An act for the punishment of certain crimes against the United States," approved April 30, 1790, said five counts, or either of them, upon their face, allege or charge any crime or offence against the defendant for which he is liable in law to be put upon trial, convicted, and punished.

Second. Whether said section 32 of the act aboved named, applies to the case and limits the time within which an indictment must be found after the commission of the offence charged; or, is the case in regard to the period of limitation within which an indictment must be found governed by section 3 of the act of Congress, entitled "An act in addition to the act entitled an act for the punishment of certain crimes against the United States," approved March 26th, A. D. 1804, or any other act limiting the period of prosecution for the offenses charged in said five counts.

And, thereupon, at and within the same term of said court, in this behalf first above named, upon the request of the defendant by his counsel, the judges, being so opposed in opinion as aforesaid, have caused the points upon which the disagreement happened to be stated as aforesaid under their direction. And it is by said judges ordered, that the foregoing statement of the case and points of disagreement be certified by the clerk of this court under the seal thereof, to the Supreme Court of the United States, at its session first to be

12 held after this date, (June 25, 1870.)

Dated this 29th day of April, A. D. 1870.

(Signed) H. H. LEAVITT.
(Signed) H. H. EMMONS.

UNITED STATES OF AMERICA,
Southern District of Ohio, ss:

I, John McLean, clerk of the circuit court of the United States within and for said district, do hereby certify the foregoing to be a true and correct transcript of the certificate and proceedings of said court had in and before said court in the case therein mentioned, remaining of record and on file in said court, and I do, in conformity with the requirement of the judges therein contained, so certify the same to the honorable the Supreme Court of the United States.

In testimony whereof, I have hereto set my hand and affixed the seal of said court this 25th day of June, A. D. 1870, and in the ninety-fourth year of American independence.

[SEAL.]

JOHN McLEAN,
Clerk U S Circuit Court.

(Indorsement on cover:) No. 490. The United States, plaintiffs, vs. Isaac N. Cooke. S. Ohio C. C. U. S. Filed 20th January, 1871.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES
vs.
ISAAC N. COOKE. } No. 270.

On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

THE UNITED STATES
vs.
ISAAC N. COOKE. } No. 270.

On a certificate of division in opinion between the Judges of the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE UNITED STATES.

STATEMENT.

The defendant was indicted in the circuit court at October term, 1864, for the embezzlement of funds held by him as paymaster in the Army of the United States.

The indictment was filed on the 1st of November, 1864; and the first five counts charge acts of embezzlement on the 1st of May, the 6th of July, the 15th of October, the 12th of September, and the 20th of September, in the year of 1862.

The defendant demurred to the first five counts of the indictment, because "it doth appear upon the face, and by the averments of the said five counts, severally, that the crime of embezzlement therein charged against him was committed more than two years before the finding and filing of said indictment, and that the prosecution therefor was, before the finding and filing of said indictment, barred by the statute in such cases made and provided."

"And thereupon the following questions occurred before the court, upon which and each of which the opinions of the judges were opposed, namely:

"*First.* Whether it was and is competent for the defendant, by his said demurrer, to take exception to the sufficiency of the first five counts of the indictment for causes assigned; and particularly, whether, as it appears on the face of each of said five counts, that the offences charged against the defendant are charged to have been committed, severally, more than two years before the indictment was returned by the grand jury and filed in court, and for that reason appearing to be barred by the provisions of section 32 of the act of Congress entitled 'An act for the punishment of certain crimes against the United States,' approved April 30, 1790; said five courts, or either of them, upon their face, allege or charge any crime or offence against the defendant for which he is liable in law to be put upon trial, convicted, and punished.

"*Second.* Whether said section 32 of the act above named applies to the case and limits the time within which an indictment must be found after the commission of the offence charged; or, is the case in regard to the period of limitation within which an indictment must be found, governed by section 3 of the act of Congress entitled 'An act in addition to the act entitled an act for the punishment of certain crimes against the United States,' approved March 26th, A. D. 1804, or any other act limiting the period of prosecution for the offences charged in said five counts."

The act of April 30, 1790, section 32, (1 Stats. at Large, 119,) enacts "That no person or persons shall be prosecuted, tried, or punished for treason or other capital offence aforesaid, wilful murder or forgery excepted, unless the indictment for the same shall be found by a grand jury within three years next after the treason or capital offence aforesaid shall be done or

committed; nor shall any person be prosecuted, tried, or punished for any offence, not capital, nor for any fine or forfeiture under any penal statute, unless the indictment or information for the same shall be found or instituted within two years from the time of committing the offence or incurring the fine or forfeiture aforesaid: *Provided*, That nothing herein contained shall extend to any person or persons fleeing from justice."

The act of March 26, 1804, section 2, (2 Stats. at Large, 290,) enacts "That any person or persons guilty of any crime arising under the revenue laws of the United States, or incurring any fine or forfeiture by breaches of the said laws, may be prosecuted, tried, and punished, provided the indictment or information be found at any time within five years after committing the offence or incurring the fine or forfeiture, any law or provision to the contrary notwithstanding."

ARGUMENT.

I.

The general rule of law is unquestionable, that while an indictment must charge the offence to have been committed at a time certain, yet the time charged in the indictment is immaterial, and the Government may prove it to have been committed at any other time not barred by any statute of limitation.

2 Hawk., ch. 46, § 32.

1 Hale, P. C., 361.

1 Archb. Crim. Pr. & Pl., (7th Amer. ed.,) 278, and cases cited.

2 Gabbett's Crim. Law, 399.

And the fact that an indictment charges the offence to have been committed antecedent to the time within which, by statute, a prosecution for the same can be brought, is not a sufficient reason for quashing the indictment, for arresting judgment, or for discharging the defendant on *habeas corpus* after judgment.

United States *vs.* White, 5 Cranch, C. C., 38.
State *vs.* Howard, 15 Rich., (S. C.,) 274.
The People *vs.* Van Santvoord, 9 Cow., 655.
State *vs.* Bowling, 10 Humph., 52.
Johnson *vs.* United States, 3 McLean, 89.

From these authorities it follows, necessarily, that, although, as charged in the indictment, the offence is barred by a statute of limitations, yet the indictment nevertheless charges an offence, and the defendant may be convicted and punished under it. It is his duty to raise the objection of the statute of limitations, and not the duty of the Government so to state the charge as to show that the time within which the defendant may be prosecuted therefor has elapsed. And in this respect the law is the same as in civil cases, where it is well settled now that the defendant must plead the statute of limitations, although it appears upon the face of the declaration that the action was brought beyond the time prescribed by the statute.

Angell on Lim., § 285, and cases cited.

The only distinction between civil and criminal cases is, that in civil cases the defendant must plead the statute in order to take advantage of it; while in criminal cases the objection may be raised under the gen-

eral issue. And the reason for the rule is the same under the United States statute limiting the time within which prosecutions can be brought, and under the ordinary statute of limitations of civil actions, namely, that there are exceptions in both statutes, and *non constat* that the crime or action does not come within one of the exceptions.

None of the authorities, usually cited as holding the contrary doctrine, applies to the present case.

In 1 Chitty on Criminal Law, 223, it is said: "When the time is material, as of the death, in case of homicide, or where the time for the prosecution is limited, as under 7 W., 3, c. 3, which provides that no prosecution shall be had for certain treasons therein mentioned, unless the bill of indictment be found within three years after the crime is committed: the time, as averred in the indictment, should appear to be within the limit."

The case of homicide has no direct application to the present case; and the case of a prosecution arising under the statute of 7 W , 3, is not applicable, because there is no exception therein; for the statute absolutely prohibits all prosecutions not brought within three years.

Commonwealth *vs.* Ruffner, 28 Penn. St., 259, only decides that the defendant may take advantage of the statute of limitations without pleading it—very familiar law.

In the State *vs.* Nolan, 29 Ind., 212, a majority of the supreme court of Indiana (Frazer, C. J., dissenting) held that where the indictment charges a criminal

offence as committed at a time subsequent to the date of the indictment, judgment will be arrested—a case which, right or wrong, is clearly distinguishable from the present one.

But the question recurs whether this objection to the indictment is fatal when raised by demurrer, and there are respectable authorities which hold that it is.

United States *vs.* Watkins, 3 Cranch, C. C., 441, 551, *et seq.*

State *vs.* Bryan, 19 Louis. An., 435.

It is submitted, however, that these cases are unsatisfactory and not reconcilable in principle with those heretofore cited.

If the omission to charge the offence as having been committed within two years, or to allege facts which bring it within the exception to the statute, does not prevent the Government from proving these facts under the general issue, when this objection is raised, it is difficult to see why their omission in the indictment should be fatal on demurrer. One reason given for holding it to be so is, that the defendant, if the demurrer is overruled, is not entitled in cases of misdemeanor to answer over except by permission of the court; but this objection would apply *a fortiori* to civil cases where, nevertheless, advantage of the statute of limitations cannot be taken by demurrer, or under the general issue; and this reason would seem to apply to every case where the defendant had demurred when he ought to have pleaded not guilty. It is more consistent with the general rules of pleading in respect of the statute

of limitations, both in civil and criminal cases, to hold, as the evidence may show the offence to have been committed within the time limited by the statute or to come under the exception therein, that the defendant must raise the objection at the trial under the plea of not guilty, and not by demurrer.

II.

The second question certified, the counsel for the Government will submit to the court without argument.

See Parsons *vs.* Hunter, 2 Sumner, 419.

GEORGE H. WILLIAMS,
Attorney General.

C. H. HILL,
Assistant Attorney General.

UNITED STATES

VS.

ISAAC N. COOK.

Supreme Court of the United States

On Certificate of Division of Opinion of the Judges of the Circuit Court of the United States for the Southern District of Ohio.

BRIEF FOR THE DEFENDANT.

H. H. HUNTER,
KEBLER & WHITMAN,
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In the Supreme Court of the United States.

THE UNITED STATES OF AMERICA
vs.
ISAAC N. COOK.

Indictment for Embezzlement founded on 16th Section of the Sub-Treasury Act of August 6, 1846.

(*On Certificate of Division of Opinion of the Judges of the Circuit Court of the United States for the Southern District of Ohio.*)

The case came before the Circuit Court for hearing, on a demurrer filed by the defendant to the first five counts of the indictment, which, as appears from the record, was returned by the grand jury, and filed in court, on the 1st day of November, A. D. 1864.

Each of these counts charges the defendant with the crime of embezzlement, as having been committed by him, he then and there being an officer of United States, to-wit: *an additional paymaster* in the army of the United States, then and there having the custody, safe keeping, and disbursement of a large sum of money before that time intrusted to him, in his official capacity as additional paymaster, etc., the day laid in the said five counts severally, being more than two years before the day of the filing of the indictment.

The cause of demurrer specially assigned is, that it appears on the face of the indictment that the prosecution was barred before the finding of the indictment.

The statute of limitations, relied upon in support of the

demurrer is, Sec. 32 of the Act of April 30, 1790, which provides:

"No person shall be *prosecuted, tried,* or *punished* for any "offense *not capital,* unless the indictment or information "for the same shall be found or instituted within *two years* "from the time of committing the offense," etc.

The case came on to be heard on the demurrer at the April Term, A. D. 1870, and the judges being opposed in opinion on two questions, the same were, at the request of the defendant, stated by the judges, and ordered to be certified by the clerk under the seal of the court to the Supreme Court of the United States at its first session, to be held after April 29, A. D. 1870.

The *first* question certified is as follows:

"*First*—Whether it was and is competent for the defen- "dant by his said demurrer, to take exception to the suffi- "ciency of the first five counts of the indictment for the "causes assigned; and particularly, whether, as it appears "on the face of the said five counts, that the offenses charged "against the defendant are charged to have been committed "severally, more than two years before the indictment was "returned by the grand jury and filed in court, and for that "reason appearing to be barred by the provisions of Section "32 of the Act of Congress, entitled, 'An act for the pun- "ishment of certain crimes against the United States, ap- "proved April 30, 1790.' Said five counts, or either of "them, upon their face allege or charge any crime or offense "against the defendant for which he is liable, in law, to be "put upon trial, convicted, and punished?"

The *second* question certified is as follows:

"*Second*—Whether said Section 32, of the act above- "named, applies to the case and limits the time within which "an indictment must be found after the commission of the "offense charged; or, is the case, in regard to the period of "limitation, within which an indictment must be found,

" governed by Section 3 of the Act of Congress, entitled, " 'An act in addition to the act entitled an act for the pun- " ishment of certain crimes against the United States,' ap- " proved March 26, A. D. 1804; or any other act limiting " the prosecutions for the offenses charged in said five " counts."

It will be in order to consider the second point first; for if the second point be decided adversely to the defendant; that is to say: If it be held that the limitation prescribed by the act of 1804 governs the case, the first point becomes immaterial. And if it do not govern the case, the labor of investigating it will already have been performed.

It will be seen, on examining Section 32 of the act of 1790, that so much of it as we have quoted above applies to *all cases* of indictment for crime, *not capital*, and necessarily applies to the case in hand, unless the case shall be holden within the meaning of the 3d section of the act of 1804, and by reason thereof, that the last named act, by implication, repeals so much of the former act as would otherwise apply to the case; and we may admit that such implication arises if the case in hand is one " arising under the Revenue " laws of the United States." That section provides that: " Any person or persons guilty of any crime arising under " the Revenue laws of the United States * * * may " be prosecuted, tried, and punished, provided the indict- " ment * * * be found at any time within five years " after committing the offense, any law or provision to the " contrary notwithstanding."

The inquiry therefore resolves itself into this: Does the crime charged against the defendant arise under the Revenue laws of the United States?

How is this question to be determined? What laws are, and what not, within the meaning of this enactment, " *Revenue laws?*" The question is one not to be answered loosely, but with that strictness which appertains to criminal law, and is to be viewed and determined in the light in which it was regarded by the framers of the law in 1804. And the first thing naturally occurring to the mind in ascertain-

ing the legislative intent is, that at that day no such office was known to the law as an additional paymaster. But that which is far more satisfactory, and which we think is, or ought to be, conclusive upon the point is, that a paymaster, or an additional paymaster in the army, intrusted with the funds of the government to be disbursed in the time of war, in the payment of the soldiers in the field, is not in any proper sense, or in any recognized acceptation of terms, in their practical or legal sense, a Revenue officer. This must be felt by, and be obvious to all, and we think is conclusive of the question.

We think the general understanding amongst professional men, government officials, members of Congress, and all men of intelligence, upon the subject is, that these terms, "*Revenue laws*," relate to those enactments of Congress which have for their object the imposing of duties and taxes for the purposes of revenue, including the collection and deposit of the same in the hands of the public depositories, and their preservation there; and, as a consequence, that an act of embezzlement by a disbursing additional paymaster, of funds placed in his hands, is in no sense, an act done or arising under the "Revenue laws," any more than would be the act of a burglar breaking into the vaults of the Treasury and carrying off the money deposited there. Either would be a crime, but not a crime arising under the "Revenue laws."

There are two principal sources of revenue, "Internal," and "Impost;" and there are laws prescribing the rates of duties and taxes, kinds of property on which the same shall be imposed, the manner and means by which the same shall be collected, kept, and paid over *into the Treasury*. These, we understand to be "*Revenue laws*." There are other laws, for instance, the "*Sub-Treasury Act*," so-called, entitled "*An Act to provide for the better organization of the Treasury, and for the collection, safe keeping, transfer, and disbursement of the public Revenue*," and various other enactments, amendatory or supplementary thereto, which are not, in the sense and acceptation of the terms in question, "*Revenue laws*." But the indictment in the present case, in the

several counts under consideration, sets forth, by their titles, *Five* several Acts of Congress, all relating to the organization, and prescribing the duties of officers of the military department; and refers to "divers other acts and parts of acts," not specified by their titles, providing for the payment of the soldiers "then and there in the military service of the United States," as the acts under and by virtue of which the defendant was entrusted with the money which it charges him with embezzleing. Surely these are not, in the sense in question, "*Revenue laws.*"

It is undoubtedly true, that these terms "*Revenue laws,*" as used in the limitation act in question, are vague and indefinite, and that it is impossible to specify what particular acts of Congress are within their meaning. This being so, the defendant is entitled to the benefit of the doubt. The general limitation prescribed by the act of 1790, beyond any doubt, covers the case, and prescribes the limitation applicable to it, unless by an implied repeal, which is not to be favored, it be otherwise.

If the act of 1790 prescribes the limitation, the question then arises whether the demurrer to the first five counts of the indictment shall be sustained?

The period of limitation is two years; and it appears on the face of each of the counts that the offense charged is laid to have been committed more than two years before the finding and filing of the indictment.

Assuming that the limitation act of 1790 applies in the case, it is literally true that no crime is charged in the indictment of which the court can take cognizance. The language of the enactment is peculiar: "No person or persons "shall be *prosecuted, tried,* or *punished* for * * * * any "offense, not capital, * * * * unless the indictment, "or information for the same, shall be found or instituted "within two years from the time of committing the offense, "* * * *provided,* that nothing herein contained shall "extend to any person or persons fleeing from justice."

It must be admitted that in all prosecutions for crime, the indictment must, upon its face, show that the defendant is charged with a crime, such as for which, if he be found

guilty, the court has power and jurisdiction to pronounce the sentence of the law, and to enforce the penalty. And it would seem to follow as a necessary legal consequence, that if the indictment upon which a party is charged, do not, upon its face, in terms, embody such a charge, that it is the duty of the court, at any stage of the prosecution, and in any form whatever in which the want of such charge or allegation shall be brought to its notice, to desist from further exercising its power or jurisdiction over the defendant.

It may be shown, on motion to quash, or on demurrer to the indictment, or by the court, *gua spoute*, when the defect appears upon the fate of the indictment; and on principle it extends to all classes of defects, whether in the substance of the act alleged as crime, not being such in law; or by reason of exemption of the defendant, by law, from prosecution under the facts alleged against him.

He is called to answer to the charge alleged in the indictment against him—*nothing else*. If upon the facts charged, *and as charged*, no liability to prosecution, or to be tried, or to punishment, rests against him by law, he is entitled to immunity; and upon every principle governing judicial proceeding, civil and criminal, the appropriate form of raising the question is by demurrer to the defective allegation. And it is self-evident that, if in a criminal proceeding by indictment, no crime be charged, the more regular form of presenting the question, in the legal nature of the subject, is by demurrer.

Suppose the indictment in the present case charged the defendant with the crime of embezzlement committed in the State of Kentucky or Indiana, can there be a question but that a demurrer should lie to the indictment; and if the objection were not taken till after trial and conviction, is there any doubt but that the judgment would be arrested; or that the court, *gua spoute*, becoming advised of the defect, would arrest the judgment and discharge the defendant, unless held over to answer under a new indictment? Surely this is so: and it would make no differance if, upon the trial, the proof were that the crime were in fact committed in Ohio, and

therefore within the jurisdiction of the court. It is not the *fact*, but the *allegation—the charge in the indictment*, that gives jurisdiction—and if, contrary to such allegation, the jury should find a special verdict, that the crime was, in fact, committed in Ohio, it would not help the matter or cure the defect. The allegations and proofs must correspond, and an indictment for a felony is not amendable.

Now, all of the same reasons fully apply to the case in hand, as to the time when the crime is charged to have been committed.

If, taking the fact as charged, no crime for which the defendant is liable, under the law, to be prosecuted, tried, and punished is charged, does it matter what the reason is —whether of *time* or *place?*

Suppose it were proved on the trial that the alleged crime was committed within two years before the finding of the indictment, could that aid the *averment?* Is it not the same question, in principle, as that in the case just supposed in regard to the place of the crime? It is, we submit, impossible to discriminate, in principle, between the two.

The question, as presented, arising upon the allegations showing the crime to be within the immunity prescribed by the statute, is essentially different from any question that might arise upon the facts, dehors the indictment, if the allegations charged the crime as having been committed within two years before it was found by the grand jury.

In such a case the defense of limitation could not, of course, be raised by motion or demurrer, and could only be made available to the defendant either by a plea setting it up, or before the jury, on a trial upon the general issue. In either case the question would arise as upon a traverse of the allegation of the indictment as to the time of the commission of the offense. By the general issue the defendant is understood to say that he is not guilty of the crime as charged, and the plea is sufficiently supported if it be shown that the crime was not committed as alleged, within the period of two years before the indictment. In such case the day alleged in the indictment is not material, except in so far as that the crime must be proved to have been com-

mitted within the period of limitation; but where the allegation is, as in this case, that the crime was committed on a day before the limitation it becomes material in this, that no crime is alleged to have been committed which under the law is amenable to punishment. In this point of view the day has materiality in behalf of the defendant, and he is entitled to the benefit of it.

Suppose, for instance, in an indictment for a burglary, punishable under the laws of the United States, found and returned by the grand jury, on the 1st day of November, A. D. 1864, the burglary were charged to have been committed on the 1st day of January, 1850, would the defendant be required to plead to the indictment, either the general issue, or specially, that the crime was not committed within two years before the indictment found?

Would the court in such case, under the provisions of the act relied upon in this case, take cognizance of the case to try it upon the merits? If the prosecution should claim that it expected to prove a crime, such as charged, committed within the limited period, would they not rather require a new indictment to be found, charging the commission of a crime within such period of time as, upon the face of the indictment, the court would have power under the law to try and punish.

Why should the law in criminal cases, which require much more strictness in tenderness to the defendant, be more lax upon a subject of this kind than in ordinary cases between parties in civil cases at law or in equity. In both these jurisdictions the law is now fully established that where, in pleading it appears by the allegations of either party, the claim asserted by him is upon the face of his allegations barred by the statute of limitations, the opposite party may demur, unless the party so pleading allege with his averments some special saving or legal reason why his cause of action is not barred by the apparent limitation; such has always been the rule in equity, though not uniformly so in actions of common law. It is so, however, in proceedings under codes of civil procedure, wherever they exist, as far as we are advised; and surely this is in accordance with the logic of special pleading, the world over.

In the case of *Sturgis, et al.*, vs. *Burton, et al.*, 8 O. S. R. 220, it is said: "Where the cause of action appears upon "the face of the petition, to be barred, there is in law no "cause of action alleged; and in analogy with the practice "in chancery, we see no objection in such case to the de- "fendant interposing a demurrer, under the code. He may "either demur in such case, or answer by setting up the "bar."

There is undoubtedly some diversity of opinion on the subject, in criminal practice, in respect to the *manner* in which this defense of limitation may or must be taken advantage of, but we respectfully submit that what we have said above in regard to it should be the rule; and there surely need not be any delicacy or hesitation about requiring the prosecution, *prima facie*, to bring itself by proper allegations within the law, so far as to show a *prima facie* case of crime, legally punishable under the law. On this subject we desire to refer the court to—

Van Santv. Pl. (2d Ed.), 688;
Whart. Am. Criminal Law, 450 (top);
Commonwealth vs. *Ruffner*, 28 Pa. St. R., 259;
People vs. *Miller*, 12 Cal., 291;
People vs. *Vantvoord*, 9 Cow. R., 655;
McLean vs. *State*, 4 Georgia, 335;
State vs. *Robinson*, 9 Foster, 274;
Johnson vs. *U. States*, 3d McLean's R., 89;
United States vs. *Ballard*, 3 McLean, 469;
United States vs. *Paul*, 6 Peters, 141;
United States vs. *Watkins*, 3 Cranch C. C., 441, 442, 550;
United States vs. *White*, 5 Cranch C. C., 73–81, 72–86;
United States vs. *Stowell*, 2 Curtis C. C, 153.

We are clear that the demurrer should be sustained.

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